IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 80 of 2004

with

CIVIL APPLICATION No. 6927 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DECD. VISHRAM LALJI VARSANI THRO' LEGAL HEIRS

Versus

VISHRAM SHAMJI MAYA RABINDIYA

Appearance:

1. Second Appeal No. 80 of 2004

MR GOVIND V PATEL for Appellants

MR TUSHAR MEHTA for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

MR. J.M.BAROT for MR HS MUNSHAW

for Respondent No. 3

SERVED BY RPAD - (N) for Respondent No. 4

UNSERVED-EXPIRED (R) for Respondent No. 5,7

..... for Respondent No. 6

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 02/02/2005

ORAL JUDGEMENT

Instant appeal under Section 100 of the Code of Civil Procedure ('the Code' for short) is directed against the judgement and decree dated 21.01.2004, rendered in Civil Regular Appeal No. 84 of 1999 by the learned Joint District Judge, Kachchh at Bhuj, by which the appeal filed by the appellants came to be dismissed and thereby judgement and decree dated 2.09.1999 rendered in Regular Civil Suit No. 66 of 1989 by the learned Civil Judge (SD) at Bhuj, decreeing the Suit filed by the respondent No.1 for declaration and injunction, came to be affirmed.

2. The present appellants are the heirs and legal representatives of deceased defendant No.4 - Vishram Lalji Varsani. Respondent No.1 was the original plaintiff whereas respondent Nos. 2 to 4 were defendant Nos. 1 to 3 and respondent Nos. 5 to 7 were defendant Nos. 5 to 7 respectively. Parties are therefore hereinafter referred to as the Plaintiff and Defendants in this judgement for the sake of convenience.

3. The plaintiff filed a Suit for declaration and permanent injunction that the orders dated 12.12.1986 and 27.3.1987 passed by defendant Nos.3 and 2 respectively, by which the land, which was sanctioned in favour of the plaintiff, was set aside are bad in law and, further to declare that the order dated 12.1.89 passed in revision is illegal, time barred, without any authority, capricious and further to restrain the defendants from taking the possession of the disputed lands, which are shown in paragraphs 1 and 2 of the plaint.

4. In the plaint it was inter alia stated by the plaintiff that he owned a house at Sukhpar and he had requested for grant of adjoining land under Rule 43(B) of the Land Revenue Rules and the same was sanctioned by defendant No.2 and the possession was handed over to him and the document was entered into in the prescribed form. The area of the land was 141.25 sq.meters and the same was sanctioned vide order dated 31.12.1982. The entry in this regard has been entered into the Khata-Book of the the plaintiff and accordingly he paid education cess and non-agricultural assessment charges. The possession of the land was continuous and undisturbed. The plaintiff stated that before grant of land, the officers of the District Panchayat, Kachchh, had visited the location and

as the surrounding residents had no objections and also, as the land was not required for public purpose, the same was granted to the plaintiff. However, defendant Nos. 1 and 3 have taken the said order in revision after four years and the matter was remanded to defendant No.2 vide order dated 12.12.1986. Defendant No.2 cancelled the original order against which the plaintiff preferred revision before defendant Nos. 1 and 3. However, the said revision was rejected. It was the say of the plaintiff that the order dated 12.12.1986, passed by defendant Nos. 1 and 3 and subsequent order by defendant No.2 dated 27.3.1987 and order under revision dated 12.1.1989 were illegal, time barred, belated, capricious and were passed under colourable exercise of powers and therefore, the same deserve to be set aside. It is further case of the plaintiff that the revision was illegally entertained after long lapse of time and that defendant No.2 had no authority to cancel his own order and therefore, the orders under dispute were nullity in the eye of law. As the orders under question were nullity, the plaintiff had not given legal notice to the concerned authorities. The plaintiff filed the suit for declaration and permanent injunction that the order dated 31.12.1982 is final and is not revocable, and that his possession is legal. The plaintiff, therefore, sought declaration that the impugned orders were illegal and prayed for permanent injunction against the implementation thereof.

5. Defendant No.2-District Panchayat, Kachchh, contested the Suit by filing written statement - Exh.10, wherein, it was, inter alia stated that though the notice under Section 320(2) of the Gujarat Panchayat Act was mandatory the plaintiff has not given the same and therefore, the Suit was premature. The act of defendant No.2 was legal and therefore the notice was not waived. It was further contended that Defendant No.4-deceased Vishram Lalji Varsani had filed a revision application against the order dated 31.12.1982 of defendant No.2. In the said revision application, defendant No.3 had set aside the impugned order and remanded the matter vide order dated 12.9.1986. Thereafter, defendant No.2 inspected the location personally and the parties were given opportunity of hearing and thereafter, the decision was taken vide order dated 20.3.1987. According to the said decision, the land under dispute did not fall within the ambit of Rule 43 of the Land Revenue Rules. There is a public highway from the land and the water pipelines are passing beneath the land and the land is of non-agricultural plot. The land in question is not vested in Panchayat and therefore, the grant has been

cancelled, as it was necessary to keep the land open in the public interest. It was further contended that people of Sukhpar had filed a suit under Order-1, Rule 8 of the Code, bearing No. 553 of 1985 and therefore, the suit was not entertainable without taking recourse of Order 1, Rule 8 of the Code. It was also contended that the suit suffered from principle of estoppel and waiver and it was denied that natural justice was violated. The defendant had prayed for dismissal of the suit.

6. Defendant Nos.4 to 7 also filed written statement at Exh.36, wherein, it was, inter alia contended that defendant No.2 before passing the order dated 31.12.1982, had not taken into consideration the objections of the village people though the land was a part of public common chowk and road and it could not have been an adjoining land. However, the same was sanctioned. The plaintiff was not using the land till he started construction on 3.12.1985 and therefore, village people had filed Civil Suit No. 553 of 1985, as they had no knowledge of order dated 31.12.1982 and on being presented the said order in the suit, the revision application before defendant No.3 was preferred and interim stay order against construction was obtained and thereafter, the said revision application was allowed by defendant No.3. It was denied that before granting the land, the same was inspected by the District Panchayat also. It was denied that the protestors were heard. Defendant No.4 contended that the said land was asked in 1981 by him, but, as the road was passing besides the said plot and as the same was a disposable and independent plot and also granting of the said land infringes the Riban Development Rules, his request was rejected. However, he was not informed. The plaintiff got the land sanctioned by influence. It was further contended that the land is of public utility and water pipelines of 9 to 12 inches are passing beneath the said land. The plaintiff had also not fulfilled condition No.4 of the grant. The opinion of the Gram Panchayat is illegal and wrong. Further, it was denied that the plaintiff was in possession of the said plot. It was further contended that the plaintiff is a rich person and has many plots, and hence he is not entitled to get adjoining land and therefore, the suit deserved to be dismissed.

7. Defendant Nos. 1 and 3 have not filed any written statement.

8. The learned trial Judge framed the issues at Exh. 43 and recorded oral as well as documentary evidence of

the respective parties. The learned trial Judge on appreciation, evaluation, critical analysis of the evidence and having heard the learned advocates for the parties, came to the conclusion that the action of the Panchayat and the State authority in reviewing the order of grant of land can be said to be perverse, patently illegal and time barred and the suit is maintainable for want of notice. The defendants failed to prove that the suit was suffering from principle of estoppel and waiver. Defendant Nos. 4 to 7 did not prove that the suit land does not belong to Panchayat and therefore the land cannot be disposed of under Rule 43(B) of the Land Revenue Code. Resultantly the learned trial Judge held that the plaintiff is entitled to get the declaration and permanent injunction as prayed for in the suit and resultantly he passed the decree.

9. Aggrieved thereby, the heirs and legal representatives of Defendant No.4 have filed Regular Appeal No. 84 of 1999 in the Court of learned District Judge, Kachchh at Bhuj. The learned Joint District Judge, on reappreciation, reevaluation, reanalysis of the evidence and after having heard the learned advocates for the parties, came to the conclusion that the learned trial Judge has committed no illegality or infirmity in passing the impugned decree. He has therefore, confirmed the finding and resultant decree of the trial Court by dismissing the appeal filed by the heirs and legal representatives of deceased defendant No.4, which has given rise to the present appeal at the instance of the heirs and legal representatives of deceased defendant No.4 who are the aggrieved party by the judgement and decree passed by the trial Court and affirmed by the learned Joint District Judge.

10. It may be noted that, in the plaint, the relief was claimed against the District Panchayat and the State of Gujarat, and the decree is passed against them by the trial Court. However, they have not challenged the said judgement and decree by filing appeal before the District Court and, therefore, they have accepted the judgement and decree of the trial Court and, resultantly qua them, the judgement and decree passed by the trial Court has reached to finality and therefore become conclusive.

11. The appeal is admitted vide order dated 3.9.2004 by this Court (Coram: A.R.Dave,J) on the following substantial question of law:

"Whether the Trial Court was right in entertaining the suit, when no notice as required

under the provisions of Section 80 of the Civil Procedure Code had been issued by the plaintiff to the State or the concerned public officer?"

12. Mr.Govind V.Patel, learned advocate of the appellants, i.e. the heirs and legal representatives of deceased defendant No.4 has contended that it is true that the State or Panchayat who were defendant Nos. 1 and 3 have not contested the Suit by filing any written statement and have not raised the contention about the statutory notice under Section 80 of the Code. However, defendant No.4 being aggrieved by the said judgement and decree can agitate the said issue of want of service notice under Section 80 of the Code and therefore this Court has rightly formulated the question of law with regard to non-service of notice under Section 80 of the Code, which is required to be answered in negative, i.e. in favour of defendant No.4 and therefore both the judgement and decree passed by the trial Court and affirmed by the Joint District Judge deserve to be quashed and set aside by allowing this appeal. He, therefore, urged to allow this appeal.

13. Per contra Mr.Tushar Mehta, learned advocate for respondent No.1 - original plaintiff has contended that so far as the substantial question of law formulated by this Court is concerned, the same is not at all a substantial question of law in view of the fact that the State has not challenged the Suit either by filing written statement or by raising the said issue during the course of its oral submission before the trial Court as well as before the first appellate Court. Therefore, there is a reason to believe that the State has waived requirement of service of notice as envisaged under Section 80 of the Code. It is further contended that the object behind serving the notice under Section 80 of the Code is succinctly explained by the Supreme Court in the case of State of Punjab v/s M/s Geeta Iron & Bras Works Ltd., AIR 1978 SC 1608 and, therefore, the substantial question of law formulated by this Court is required to be answered in affirmative, i.e. against defendant No.4 and in favour of original plaintiff. Besides this, he also contended that the concurrent finding of fact recorded by both the Courts below with regard to the challenge made by the plaintiff cannot be assailed in a Second Appeal as it does not involve any question of law much less substantial question of law, requiring any interference under Section 100 of the Code. He, therefore, urged to dismiss the appeal.

14. Mr. J.M.Barot, learned advocate for respondent

No.3 - defendant No.2 - The Kachchh District Panchayat has supported the submissions advanced by Mr.Mehta, learned advocate for respondent No.1 and has also contended that there is no substance in the Second Appeal which deserves to be dismissed. He, therefore, urged to dismiss the appeal.

15. I have considered the submissions advanced by the learned advocates appearing for the parties. I have perused the averments made in the memo of the appeal, grounds set out there, and the impugned judgement and decree recorded by both the courts below.

16. The plaintiff has filed Suit for declaration and injunction that the orders dated 12.12.1986 and 27.3.1987 passed by defendant Nos. 2 and 3 respectively, by which the land which was sanctioned in favour of the plaintiff, was set aside, are bad in law and further to declare that the order dated 12.1.89 passed in revision is illegal, time barred, without authority, capricious and further to restrain the defendants from taking the possession of the disputed land, which is shown in paragraph 1 and 2 of the plaint, by way of permanent injunction.

17. Pleadings of the parties are detailed in the foregoing paragraphs, therefore, it is not necessary to reproduce the said facts to burden this judgement. The learned trial Judge recorded the finding that the action of the Panchayat and the State Government in reviewing the order of grant of land can be said to be perverse, patently illegal and time barred and the suit is maintainable inspite of non-service of notice and therefore he passed the decree in favour of the plaintiff as prayed for. The learned Joint District Judge, on reappreciation, reevaluation and reanalysis of the facts came to the same conclusion and dismissed the appeal.

18. In aforesaid view of the matter, there is concurrent finding of facts recorded by both the Courts below which generally cannot be assailed in a Second Appeal unless the appeal involves substantial question of law.

19. On going through the substantial question of law formulated by this Court, it cannot be disputed that the State Government has not filed written statement refuting the averments made in the plaint. However, they have contested the suit by making their oral submissions. Since defendant No.4 has raised the issue about the non-service of the notice under Section 80 of the Code, the Trial Court has raised the issue vide issue No. 2

and while answering the said issue the Trial Court held that the order passed by the revenue authorities is illegal and time barred, therefore, notice is not necessary.

20. Besides this, at the cost of repetition, according to this Court, neither the State nor the Panchayat has challenged the said finding by filing the appeal before the District Court, therefore, the point which is concluded by the trial Court and which is affirmed by the learned first appellate Court, it is therefore now not open for defendant No.4 to raise the issue of non-servicing of the notice under Section 80 of the Code.

21. The object behind serving the notice u/s. 80 of the Code is succinctly explained by the Supreme Court in the case of State of Punjab v/s M/s Geeta Iron Brass Works (supra), wherein, the Supreme Court has held as under:

> "A statutory notice of the proposed action u/s. 80 C.P.C. is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in Court."

In view of the clear elucidation of the Supreme Court, a statutory notice of the proposed action under Section 80 of the Code is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted.

22. In the instant case neither the State nor the District Panchayat has challenged the impugned judgement and decree passed against it before the District Court, therefore, according to this Court, substantial question of law formulated by this Court is required to be answered against defendant No.4 who is aggrieved by the judgement and decree passed against the State Government.

23. Seen in the above context, this Court finds itself in complete agreement with the findings recorded, ultimate conclusion arrived at and the resultant decree

passed by the learned trial Judge, which has been affirmed by the learned first appellate Judge. According to this Court, no other conclusion is possible except the one reached by both the Courts below.

24. In aforesaid view of the matter, the appeal lacks merit and deserves to be dismissed.

25. For the foregoing reasons, the appeal fails and is accordingly dismissed with no order as to costs.

26. Since the appeal is dismissed, Civil Application No. 6927 of 2004 which is filed for stay of the impugned judgement and decree also stands dismissed with no order as to costs. Rule is discharged. Ad interim relief granted earlier shall stand vacated.

27. At this stage Mr. Govind V. Patel, learned advocate of the defendants, urged that the ad interim relief granted by this court vide order dated 3.9.2004, which has remained operative till today, may be extended for a further period of two weeks to enable the appellants, i.e. heirs and legal representatives of deceased defendant No.4 to take further legal recourse.

28. Mr. Tushar Mehta, learned advocate of the Plaintiff has objected the prayer for continuing the ad interim relief as, according to him, when this Court has dismissed the appeal on merit, no such extension can be granted.

29. This Court has considered the prayer made by Mr. Patel, learned advocate of the appellants, i.e. heirs and legal representatives of deceased defendant No.4 and the objection raised by Mr.Tushar Mehta, learned advocate of the plaintiff.

30. According to this Court, as there is concurrent finding of facts recorded by both the Courts below and the substantial question of law about non-service of notice is answered against the appellants, i.e. heirs and legal representatives of deceased defendant No.4, the request made by Mr. Patel cannot be accepted and hence the same is rejected.

(A.M.Kapadia,J)

Jayanti*